United States Court of Appeals for Veterans Claims

Vet. App. No. 15-2645

THOMAS R. BYRD,

Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S BRIEF

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II. Whether the Court should vacate and remand the portion of the Board's decision denying Mr. Byrd entitlement to a total disability rating based on individual unemployability because it is not supported by an adequate statement of reasons and bases?

STATEMENT OF THE CASE

The appellant, Mr. Thomas R. Byrd (hereinafter referred to as "Mr. Byrd" or the "Veteran"), appeals the April 27, 2015 decision of the Board of Veterans' Appeals ("Board") that denied entitlement to a rating for posttraumatic stress disorder ("PTSD") in excess of 70 percent and entitlement to total disability based on individual unemployability ("TDIU"). Record Before the Agency ("R.") 2–21. The Court has jurisdiction over this case pursuant to 38 U.S.C. §§ 7252(a) and 7266.

STATEMENT OF THE FACTS

Mr. Byrd had active, honorable service as an infantryman in the United States Army from April 1965 to April 1967, and his tour of duty included service in Vietnam. R. at 167. Mr. Byrd has reported that he was involved in heavy combat operations and witnessed significant loss of life. R. at 130–31 (130–34). He has also reported sustaining an injury to his foot from a punji stick. R. at 131 (130–34); R. at 266 (265–72). He was awarded the Purple Heart in addition to other medals and commendations, including, but not limited to, the Combat Infantryman's Badge, and the Vietnam Service Medal. R. at 167. He is currently service-connected for PTSD and diabetes mellitus, type II with

neurological manifestations of the lower extremities and erectile dysfunction. R. at 78 (76–85).

Procedural History of Claims

Mr. Byrd first applied for service connection for multiple psychiatric-related disabilities in 1986. R. at 609–12. These disabilities included, but were not limited to, a nervous condition, depression, post-traumatic stress syndrome, and trouble sleeping. *Id.* In July 2005, the VA regional office ("RO") awarded service connection for Mr. Byrd's PTSD and assigned a disability rating of 10 percent. R. at 389 (R. 382–90). In August 2005, Mr. Byrd filed a timely Notice of Disagreement with respect to the disability rating. R. at 380. The RO, however, continued the 10 percent evaluation in an October 2006 Statement of the Case. R. at 330 (317–31). In April 2006, VA awarded service connection for Mr. Byrd's diabetes. R. at 355 (347–55). His diabetes was rated at 20 percent disabling based on oral medication and a restricted diet. *Id.*

In July 2008, the Veteran renewed his request for an increase in his PTSD rating, as well as a request to increase his diabetes evaluation based on the development of neuropathy of the legs. R. at 264. In a rating decision dated December 15, 2008 and mailed on December 19, 2008, the RO found that Mr. Byrd's neurological manifestations of the lower extremities and his erectile dysfunction were secondary to his service connected diabetes. R. at 179–80 (170–80). The RO noted decreased vibration sense bilaterally as well as decreased reflexes in the ankle. R. at 179 (170–80). The RO found these neurological abnormalities were not compensable because there was no evidence of decrease in sensation, and combined the neurological manifestations of the lower

extremities with the diabetes evaluation. R. at 180 (170–80). Special monthly compensation was also awarded for loss of a creative organ. *Id.* That same decision increased Mr. Byrd's PTSD rating to 70 percent. R. at 177–79 (170–80).

On December 29, 2008, the RO received Mr. Byrd's VA Form 21-8940, Veteran's Application for Increased Compensation Based on Unemployability. R. at 149–51. On the application, Mr. Byrd stated that he was unable to secure or maintain substantially gainful employment due to his PTSD, diabetes, and peripheral neuropathy. *Id.* In July 2009, the RO continued the 70 percent rating for the PTSD, the 20 percent rating for diabetes with erectile dysfunction and neurological manifestations of the lower extremities, and denied TDIU. R. at 76–85. Mr. Byrd filed a timely Notice of Disagreement challenging the 70 percent rating, the diabetes rating, and the TDIU denial. R. at 74. In July 2010, the RO issued a Statement of the Case ("SOC") addressing the evaluation of the PTSD and the denial of TDIU. R. at 37–57. A substantive appeal to the Board was perfected appealing all issues in the SOC. R. at 36.

Diabetes Medical Examinations

Mr. Byrd was afforded two VA medical examinations to assess his diabetes. The first was conducted in September 2008 and specifically addressed the diabetic complications Mr. Byrd was experiencing—erectile dysfunction and neurological manifestations in his lower extremities. R. at 232–36. The examiner noted that Mr. Byrd felt the monofilament from his knees down to his toes, but the vibratory sense in his toes was absent. R. at 233 (232–36). The examiner further noted that Mr. Byrd could feel the monofilament in the ankle, but not strongly when compared to the mid tibia or knee. *Id.*

Ankle reflexes were absent. *Id.* The examiner also noted a diminished vibratory sense of the distal extremities. *Id.*

Mr. Byrd was examined again by a different examiner in April 2009 and at that time complained of pain, numbness, and burning in his feet, as well as crooked toes. R. at 102, 104 (102–08). No neuropathy or sensory loss was noted on this examination, and the results of the monofilament diabetic foot screen was normal in all five areas. R. at 106 (102–08). The examiner noted that Mr. Byrd's diabetes was well-controlled. *Id.*

Mental Health Examinations

During the appeal period, Mr. Byrd was assessed twice by a private licensed psychologist, W.A., and twice by VA examiners. R. at 265–72; R. at 237–39; R. at 130–34; R. at 109–112. In June 2008, W.A. assigned Axis I diagnoses of PTSD and Depressive Disorder Not Otherwise Specified, and noted problems related to social environment, occupational problems, economic problems, and other psychosocial and environmental problems on Axis IV. R. at 271–72 (265–72). She assigned a Global Assessment of Functioning (GAF) score of 47.[1] R. at 271 (265–72). This score was assigned based on Mr. Byrd's difficulties in multiple areas including social functioning, judgement-related issues, thinking difficulties, and mood. His prognosis was extremely

[1] A GAF score is a scale reflecting the psychological, social, and occupational functioning of the individual on a hypothetical continuum of mental health-illness. *Richard v. Brown*, 9 Vet. App. 266, 267 (1996) (citing the DSM-IV at 32 (4th ed. 1994)). A GAF score between 41 and 50, inclusive, is defined to mean: "**Serious symptoms** (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) **OR any serious impairment in social, occupational, or school functioning** (e.g., no friends, unable to keep a job)." AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 32 (4th ed. 1994) (emphasis in original).

guarded. *Id.* W.A. took an extensive background history from Mr. Byrd, including an account of his combat experiences. R. at 265–69 (265–72). Under the category of "Persistent Reexperiencing," W.A. noted that Mr. Byrd had daily and nightly recurrent intrusive thoughts, recurrent nightmares, night sweats, and flashbacks. R. at 269 (265–72). Under the category of "Persistent Avoidance or Numbing," Mr. Byrd was noted to have a history of intensive efforts to avoid his traumatic experiences. *Id.* He described working day and night just so he could go to sleep. *Id.* He reported feelings of detachment, estrangement from others and demonstrated a restricted range of affect. *Id.* His sense of a foreshortened future was also manifest. *Id.*

Under the category of "Persistent Arousal," W.A. noted Mr. Byrd's marked problems with insomnia. R. at 269 (265–72). Concentration problems were described, as was possible dissociative symptomology. *Id.* Hypervigilance and an exaggerated startle response were also noted. *Id.* Under the category of "Other," W.A. noted that "psychomotor agitation was highly evident during the interview" and that psychomotor retardation was also described. R. at 269 (265–72). W.A. described what she deemed to be significant experiences of fatigue and loss of energy. *Id.* Concentration, mood, and sleep problems were also described. *Id.* W.A. stated that recurrent thoughts of death, including suicidal ideation, were described. *Id.* The means, plans, time frames, and immediate intent were denied. *Id.* Mr. Byrd also described continued, intermittent homicidal ideation characterized by an "urge to kill." *Id.* He strongly acknowledged a history of road rage including an incident where he approached an automobile with a baton after being cut off by another driver. R. at 269 (265–72). During the January

2009 examination, Mr. Byrd described significant pain in his arms and reported that a physician had determined that he likely experienced these symptoms as a result of diabetic neuropathy or as a result of problems with his shoulders. R. at 132 (130–34).

In addition to discussing Mr. Byrd's psychological symptoms, W.A. also conducted a mental status examination. R. at 270 (265–72). During this examination, Mr. Byrd was oriented times three, but his attention, concentration, memory, judgment, and insight all appeared to fall below normal limits. *Id.* His impulse control, as evidenced by history of road rage, appeared to fall below normal limits. *Id.* His thought content was consistent with the presence of homicidal and suicidal ideation, and his attention and concentration were below normal limits. *Id.* Specifically, he was noted to have circumstantial speech and was unable to recall any items from a three item list after an interference task was interjected. *Id.* W.A. summarized her findings by noting, among other things, that Mr. Byrd had a number of assets, but that his social functional impairment was evident. R. at 271 (265–72). She found Mr. Byrd to have "[s]ignificant cognitive difficulties" as evidenced by his problems with attention, concentration, and immediate memory, as well as problems with emotional and behavioral controls, as evidenced by his history of suicidal and homicidal ideation. *Id.* She concluded that Mr. Byrd's PTSD symptoms were severe. *Id.*

In September 2008, Mr. Byrd was examined by a VA examiner. R. at 237–39. During the examination, Mr. Byrd complained that his PTSD symptoms were getting worse. R. at 237 (237–39). Specifically, he described an increasing temper, relationship problems, sleep disturbances—including nightmares several times a week accompanied

by intrusive thoughts. *Id.* He described being anxious, short-tempered, easily startled, hypervigilant and avoidant. *Id.* He was noted to be able to attend to his activities of daily living. R. at 238 (237–39). No homicidal or suicidal ideations or thought impairment were noted. *Id.* He was oriented times three. *Id.* His insight and judgment were deemed by the examiner to be adequate. *Id.* No loosened associations, flight of ideas, or bizarre moto movements were noted during the examination. *Id.* The examiner assigned an Axis I diagnosis of PTSD and on Axis IV noted impairment in interpersonal relationships. R. at 239 (237–39). The examiner assigned a GAF score of 54 and assessed the degree of his impairment regarding employment and social activities as mild to moderate. *Id.*

In January 2009, Mr. Byrd was again examined by W.A., a private psychologist. R. at 130–34. She assigned an Axis I diagnosis of PTSD and Depressive Disorder Not Otherwise Specified. R. at 133 (130–34). On Axis IV, W.A. noted problems related to social environment, occupational problems, economic problems, as well as other psychosocial and environmental problems. *Id.* She assigned a GAF score of 39.[2] *Id.* This score was assigned based on Mr. Byrd's difficulties in multiple areas including social functioning, judgment-related issues, thinking difficulties and mood. *Id.* She noted Mr. Byrd's pattern of comparative social isolation and judgment related issues, principally his homicidal ideation and road rage. She also noted difficulties in attention,

[2] A GAF score of between 31 and 40, inclusive, is defined to mean**: Serious impairment in reality testing or communication** (e.g., speech is at times illogical, obscure, or irrelevant) **OR** major impairment in several areas such as work or school, family relations, judgment, thinking or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school). DSM-IV at 32 (emphasis in original).

concentration, and mood. *Id.* Under the heading "Persistent Reexperiencing," W.A. noted Mr. Byrd's daily and nightly recurrent intrusive thoughts, associated flashbacks, survival guild, nightmares, night sweats. R. at 131 (130–34). Under the heading "Persistent Avoidance or Numbing," W.A. noted Mr. Byrd's intensive efforts at avoidance, recall problems, estranged relationships, and a restricted range of affect. *Id.* He also described a marked change in expectations with a sense of a foreshortened future. *Id.* Under the heading "Persistent Arousal," Mr. Byrd was noted to have marked problems with insomnia characterized by difficulties with sleep onset, intermittent waking, and terminal waking. He was also noted to have irritability and anger outbursts. Concentration problems, hypervigilance, and an exaggerated startle response were also reported during the interview. *Id.*

Under the category of "Other," W.A. described Mr. Byrd's variable mood most of the day, nearly every day, as well as recurrent problems with insomnia and concentration. R. at 132 (130–34). Psychomotor agitation was firmly acknowledged as was psychomotor retardation. *Id.* Mr. Byrd reported experiencing significant fatigue and loss of energy. He described recurrent thoughts of death and suicidal ideation, but means, plans, time frames, and immediate intent were denied. *Id.* Mr. Byrd continued to describe continuing, intermittent, homicidal ideation. *Id.*

W.A.'s assessment of Mr. Byrd also included a mental status examination. R. at 132 (130–34). During this examination, Mr. Byrd was oriented times three. *Id.* His impulse control, as evidenced by his history of severe road rage continued to fall below normal limits. *Id.* His form of thought was circumstantial and his thought content was

consistent with the presence of both suicidal and homicidal ideation. *Id.* Mr. Byrd also acknowledged perceptual abnormalities which took the form of seeing images out of the corner of his eye. *Id.* His affect was normal and stable during the evaluation. Mr. Byrd's attention and concentration fell below normal limits, as did his judgment and insight. R. at 132 (130–34).

In her summary of the examination, W.A. noted that Mr. Byrd's homicidal tendencies and his inability to maintain a normal standard of living. R. at 133 (130–34). His "[p]roblems with emotional and behavioral control, as evidenced by his history of angry outbursts and suicidality were acknowledged, and likely render Mr. Byrd to be a danger to any work environment." *Id.* His cognitive abilities were also noted to likely have a negative impact on any work. *Id.* His overall PTSD symptoms were characterized again severe, chronic, not highly amenable to treatment, and not anticipated to remit within the next thirteen months. R. at 133–34 (130–34).

In April 2009, Mr. Byrd was examined by a VA examiner. R. at 109–12. During the examination, Mr. Byrd noted that his PTSD had worsened and that things stay on his mind more and that he stays to himself more. R. at 109 (109–12). He was noted to have problems sleeping including falling asleep and awakening three to five times a week with daily intrusive thoughts. *Id.* He discussed that he was anxious 80 to 90 percent of the time, was easily startled, intolerant of crowds, hypervigilant and short tempered. *Id.* No suicide attempts or panic attacks were noted. *Id.* In reviewing Mr. Byrd's medical record, the examiner noted that he had been seen at the VA for an examination in 2005 and given a diagnosis of PTSD. R. at 110 (109–12). The examiner also noted that Mr. Byrd had

undergone a psychological evaluation in June 2008 and was seen again at the VA for an examination in September 2008. R. at 110–11 (109–12).

During the mental status evaluation Mr. Byrd was oriented times three. R. at 111 (109–12). He did not evidence any loosened associations, flight of ideas, or bizarre motor movements. *Id.* The examiner noted Mr. Byrd's mood during the evaluation as cooperative and friendly, but "a bit tense." *Id.* Mr. Byrd told the examiner that he had nightmares and intrusive thoughts. *Id.* No impairment in thought processes or communication was noted, and the examiner noted no homicidal or suicidal ideation or intent. *Id.* The examiner noted that Mr. Byrd was anxious, somewhat irritable, stays to himself, has a few friends, occasionally goes to church, and has limited interests. R. at 111 (109–12). The examiner opined that Mr. Byrd's psychiatric symptoms result in some impairment of employment and social functioning. *Id.* Finally, the examiner opined that it was his opinion that Mr. Byrd's psychiatric symptoms would indeed make employment, sedentary or active, more difficult, but would not in and of themselves preclude employment. *Id.*

The April 2015 Board Decision on Appeal

On April 27, 2015, the Board issued the decision here on appeal. R. at 2–21. The Board denied a rating for the PTSD in excess of the 70 percent assigned and denied entitlement to TDIU *Id.* In support of its finding that Mr. Byrd's PTSD disability more nearly approximated the criteria for a 70 percent disability rating, the Board noted that his PTSD symptoms resulted in occupational and social impairment with deficiencies in most areas due to symptoms of chronic sleep impairment, intrusive thoughts,

hypervigilance, depression, poor concentration, irritability, anxiety, and occasional homicidal and suicidal ideation. R. at 4 (2–21).

The Board also found that Mr. Byrd has not been rendered unable to obtain or maintain substantially gainful employment as a result of service-connected disabilities. *Id.* The Board found that Mr. Byrd met the minimum schedular criteria under 38 C.F.R. § 4.16(a) for an award of TDIU, but that the weight of evidence was against finding that Mr. Byrd's PTSD and diabetes rendered him unable to obtain and maintain substantial gainful employment. R. at 17 (2–21). The Board's finding was based upon its conclusion that Mr. Byrd could work as a truck driver as evidenced by his prior work history and that the medical evidence demonstrated that he would not be precluded from employment. R. at 17–19 (2–21).

SUMMARY OF THE ARGUMENT

The Board's finding that Mr. Byrd's symptoms are commensurate with a 70 percent disability rating is clearly erroneous, because the evidence establishes that Mr. Byrd suffers from symptoms that are specifically listed in the criteria for 100 percent rating. Reversal is the appropriate remedy because there is only one permissible view of the evidence. Alternatively, should this Court conclude that reversal is not the appropriate remedy, vacatur and remand are required for the Board to provide an adequate statement of reasons and bases for its findings.

Additionally, the Board failed to support its denial of entitlement to TDIU with an adequate statement of reasons and bases. Most importantly, the Board denied Mr. Byrd TDIU based on its own medical judgment regarding the functional import of his

symptoms and further relied on an inadequate medical opinion rendered by a VA examiner. Finally, the Board erred in delimiting the period on appeal related to the increased rating claim for PTSD and the application for TDIU to on or after the December 29, 2008, the date Mr. Byrd filed a VA Form 21-8940.

ARGUMENT

I. THE BOARD ERRED IN FINDING THAT MR. BYRD'S POSTTRAUMATIC STRESS DISORDER SYMPTOMS MORE NEARLY APPROXIMATED A 70 PERCENT RATING.

The assignment of a disability rating is a finding of fact that is subject to the clearly erroneous standard of review under 38 U.S.C. § 7261(a)(4). *Powell v. West*, 13 Vet. App. 31 (1999). This Court has held that "'[a] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (internal quotations omitted). *See Padgett v. Nicholson*, 19 Vet. App. 133, 146 (2005), *withdrawn on other grounds*, 19 Vet. App. 334 (2005), *reversed and remanded*, 473 F.3d 1164 (Fed. Cir. 2007), *reinstated*, 22 Vet. App. 159 (2008). A finding is not "clearly erroneous" if there is a "plausible" basis for the finding in the record. *Gilbert*, 1 Vet. App. at 53; *Padgett*, 19 Vet. App. at 146.

The rating criteria for evaluating PTSD are found at 38 C.F.R. § 4.130, Diagnostic Code ("DC") 9411. Under 38 C.F.R. § 4.130, DC 9411, a 70 percent disability rating is warranted when the evidence demonstrates:

> Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.

A 100 percent disability rating is warranted when the evidence demonstrates:

> Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

Id.

In applying 38 C.F.R. § 4.130, the Board need not find "the presence of all, most, or even some, of the enumerated symptoms" in order to find that the evidence establishes entitlement to the correlating disability rating. *Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2002). In *Mauerhan*, this Court made clear that "the factors listed in the rating formula [found in § 4.130] are 'examples' of conditions that warrant particular ratings." *Id.* Indeed, in promulgating the rating criteria under 38 C.F.R. § 4.130, the Secretary explained that "it is not the symptoms, but their effects, that determine the level of impairment." Schedule for Rating Disabilities; Mental Disorders, 61 Fed. Reg. 52,695, 52,697 (Oct. 8, 1996) (codified at 38 C.F.R. Part 4); *see also* 38 C.F.R. § 4.126 (providing that evaluations of mental disorders in particular must consider all of the evidence of record that bears on occupational and social impairment).

Although a veteran need not demonstrate that he or she suffers from the exact symptoms enumerated in 38 C.F.R. § 4.130, the Federal Circuit has made clear that "a veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, *or others of similar severity, frequency, and duration*." *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013) (emphasis added).

Furthermore, in evaluating any disability, the VA must assign the higher rating whenever there is a question as to which of two evaluations apply, and the benefit of the doubt as to the level of disability must be resolved in the veteran's favor. 38 C.F.R. §§ 4.3, 4.7. The benefit of the doubt standard is statutorily mandated by 38 U.S.C. § 5107(b). The clearly erroneous standard of review provided for in 38 U.S.C. § 7261 also applies to the Board's application of the benefit of the doubt standard. *See Padgett*, 19 Vet. App. at 146. Under this standard, "'the preponderance of the evidence must be *against* the claim for benefits to be denied.'" *Id.* (quoting *Gilbert*, 1 Vet. App. at 54) (emphasis added).

A. <u>The Board's finding against a 100 percent rating is clearly erroneous because the evidence establishes that Mr. Byrd suffers from symptoms that are specifically identified in the 100 percent criteria and that fall somewhere between the 70 and 100 percent criteria.</u>

The Board found that Mr. Byrd's PTSD symptoms include chronic sleep impairment, intrusive thoughts, hypervigilance, depression, poor concentration, irritability, anxiety, and *occasional* homicidal and suicidal ideation. R. at 4 (2–21). However, contrary to the Board's finding, Mr. Byrd's homicidal and suicidal ideations

are *persistent* and he also suffers from a myriad of other symptoms that are either expressly listed examples warranting a 100 percent rating, or are somewhere in between the 70 and 100 percent rating criteria.

Persistent danger of hurting self or others is expressly listed as a symptom under the criteria for 100 percent rating. The medical evidence of record demonstrates that Mr. Byrd has suffered from suicidal and homicidal ideations that have persisted since at least June 2008 and that these ideations led a private psychologist, W.A., to conclude that he would be a "danger to any work environment." R. at 133 (130–34). Mr. Byrd's persistent homicidal and suicidal ideations thus result in total work impairment and are sufficient to grant him the 100 percent rating. Accordingly, the Board's finding to the contrary is erroneous.

The Board's finding that the January 2009 examination by W.A. and the VA examination of April 2009 did not evidence gross impairment in thought processes was also erroneous. R. at 12–13 (2–21). Here, Mr. Byrd's thought processes are plagued both by thoughts of suicidal and homicidal ideations, as well daily and nightly recurrent intrusive thoughts which significantly impair his ability to function.[3] R. at 131 (130–34); R. at 269 (265–72); R. at 109 (109–12).

[3] Mr. Byrd was also noted to be having possible dissociative symptomology. The DSM-5 notes that dissociative symptoms "can potentially disrupt every area of psychological functioning." AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 291 (5th ed. 2013).

The evidence also establishes that Mr. Byrd suffers from symptoms that fall somewhere between the 70 and 100 criteria. As the Federal Circuit explained in *Vazquez-Claudio*, 713 F.3d at 117, 38 C.F.R. § 4.130 "provide[s] a regulatory framework for placing veterans on the disability spectrum based upon their objectively observable symptoms." Thus, when a symptom or symptoms do not fit squarely within the criteria for a certain rating, but rather somewhere in between that rating and the next lower rating, the benefit of the doubt must be accorded to the veteran, and it must be concluded that the symptom is of similar severity, frequency, and duration as the symptoms listed in the criteria for the higher rating. *See* 38 U.S.C. § 5107(b); *see also* 38 C.F.R. § 4.7. Here, the symptoms that fall somewhere between the 70 percent and 100 percent rating criteria include perceptual abnormalities (in the form of seeing things out of the corners of his eyes), psychomotor agitation, psychomotor retardation, and impairment of immediate memory.

Mr. Byrd has been noted to experience perceptual abnormalities in the form of seeing things out of the corners of his eyes. R. at 132 (130–34). His PTSD has also manifested itself in physical impairments including psychomotor agitation and psychomotor retardation. *Id.*; R. at 269 (265–72). Additionally, while Mr. Byrd can recall his name, his immediate memory and his working memory are impaired to the point that he cannot recall four items in both the forward and backward direction. R. at 270 (265–72). His concentration abilities are equally impaired. On one test he was unable to recall any items from a three-item list subsequent to an interference task, and on

another test he was only able to recall two items from a three item test subsequent to an interference task. R. at 132 (130–34); R. at 270 (265–72).

Mr. Byrd's PTSD symptoms, including the aforementioned, have been found to be chronic, persistent, and not highly amenable to treatment. R. at 133 (130–34); R. at 111 (109–12). For example, in her January 2009 opinion, W.A. specifically noted that Mr. Byrd's combat-related PTSD is a chronic condition that is not highly amenable to treatment. R. at 133 (130–34). And, the VA examiner conducting the April 2009 examination also noted that Mr. Byrd has had persistent symptoms of posttraumatic stress disorder with no remissions. R. at 111 (109–12). Each of the symptoms discussed is more severe than the specific symptoms listed in the 70 percent criteria, although perhaps not as severe as the symptoms listed in the 100 percent criteria. Nonetheless, the benefit-of- the-doubt rule requires the Board to conclude that the symptoms are commensurate with the 100 percent criteria, not the 70 percent criteria. *See* 38 U.S.C. § 5107(b); 38 C.F.R. § 4.7. This is particularly true where, as here, Mr. Byrd suffers from persistent homicidal and suicidal ideations and gross impairment in his thought processes, symptoms specifically contemplated by the 100 percent criteria.

Mr. Byrd's symptoms have also caused total occupational and social impairment. 38 C.F.R. § 4.130. Mr. Byrd's homicidal tendencies, suicidality, and his problems with emotional and behavioral controls led W.A. to conclude that he would be a danger to any work environment. R. at 133 (130–34). Mr. Byrd's inability to regulate his emotions and his lack of impulse control isolate him and make his interactions with others dangerous to him and those around him. R. at 132–33 (130–34). As an example of this, W.A. pointed

to his extreme road rage incident where Mr. Byrd approached another automobile brandishing a baton. R. at 269 (265–72). Thus, the Board's finding that Mr. Byrd's "disability picture has not more nearly approximated the criteria for a 100 percent rating based on symptoms and the degrees of social and occupational impairment" is clearly erroneous. As there is only one permissible view of the evidence—that Mr. Byrd is entitled to a 100 percent rating—this Court should reverse the Board's finding to the contrary. *See Hersey v. Derwinski*, 2 Vet. App. 91, 94 (1992) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (a "factual finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed")).

B. Alternatively, the Court should vacate and remand the increased rating claim for PTSD, so that the Board can provide an adequate statement of reasons and bases for its decision.

If the Court does not agree that the Board's findings are clearly erroneous or that reversal is the proper remedy, the Court should remand the claim so the Board can provide an adequate statement of reasons or bases for its findings, as required under 38 U.S.C. § 7104(d)(1). The Board's reasons and bases for denying Mr. Byrd's entitlement to a 100 percent disability rating for his PTSD are inadequate for several reasons. First, the Board's analysis and the bases of its determination was the presence or absence of the specific symptoms found the criteria for a 100 percent rating listed in 38 C.F.R. § 4.130. In assessing Mr. Byrd's entitlement to a disability rating in excess of 70 percent, the Board stated:

> In consideration of the evidence above, the Board finds that, for the entire rating period from December 29, 2008, the weight of the evidence is against finding that the PTSD more nearly approximates total occupational and social impairment, as required for an increased rating of 100 percent. Although the evidence reflects both suicidal and homicidal ideation, W.A. noted that the Veteran denied specific means, plans, time frames, or immediate intent for either. During the April VA examination, the Veteran denied either suicidal or homicidal ideation. Mental status examinations from both W.A. and the April 2009 VA examiner, although revealing deficiencies in some areas such as concentration, did not show evidence of gross impairment in thought processes or communication, persistent delusions, or hallucinations, grossly inappropriate behavior, persistent danger of hurting self or others, intermittent inability to perform activities of daily living, or disorientation to time or place.

R. at 12–13 (2–21). This laser focus on the explicitly listed symptoms runs afoul of this Court's precedent in *Mauerhan*. 16 Vet. App. at 442 (stating that the "use of the term 'such as' demonstrates that the symptoms after the phrase are not intended to constitute an exhaustive list, but rather are to serve as examples of the type and degree of symptoms, or their effects that would justify a particular rating" and that the assignment of a particular rating does not require the presence of "all, most, or even some, of the enumerated symptoms"). In this case, the Board used the rating criteria symptoms as a checklist rather than exemplars and thus failed to discuss many of Mr. Byrd's PTSD symptoms described in Section I.A. of this brief.

Second, the Board failed to explain why Mr. Byrd's homicidal tendencies and suicidal ideation—symptoms that the private psychologist, W.A., determined were severe enough for her to warn that he would be a danger to any work environment—would not rise to the level of severity warranting a 100 percent rating, especially when he appears to have threatened someone with a baton. R. at 133 (130–34); 269 (265–72).

Finally, the Board's finding that Mr. Byrd's disability picture had not more nearly approximated the criteria for a 100 percent rating based on symptoms and the degrees of social and occupational impairment is directly contradicted by W.A.'s January 2009 medical opinion that the Board did not find lacking, and WA's June 2008 medical examination[4] that the Board did not address. *See* R. at 133 (130–34) (noting that Mr. Byrd was likely to be a "danger to any work environment"). Thus, at the very least, vacatur and remand are required for the Board to provide an adequate statement of reasons or bases for its findings.

II. THE COURT SHOULD VACATE AND REMAND THE PORTION OF THE BOARD'S DECISION DENYING MR. BYRD ENTITLEMENT TO A TOTAL DISABILITY RATING BASED ON INDIVIDUAL UNEMPLOYABILITY BECAUSE IT IS NOT SUPPORTED BY AN ADEQUATE STATEMENT OF REASONS AND BASES.

Mr. Byrd's service-connected disabilities include PTSD, rated at 70 percent disabling, and diabetes mellitus with erectile dysfunction and neurological manifestations of the lower extremities, rated at 20 percent. R. at 78 (76–85). His combined disability rating has been 80 percent throughout the appeal. *Id.* Because he meets the threshold percentage requirements for a grant of TDIU, he is entitled to this benefit if he is unable to secure (*i.e.* obtain) or follow (*i.e.* maintain) a substantially gainful occupation as a result of these service-connected disabilities. 38 C.F.R. § 4.16(a). Unlike disability ratings assigned under the schedular criteria which are based on the average work-related

[4] As explained in Section II.B. of this brief, this examination should have been considered by the Board because it is within the claim period on appeal.

impairment caused by a disability, "entitlement to TDIU is based on an individual's particular circumstances." *Rice v. Shinseki*, 22 Vet. App. 447, 452 (2009).

A. The Board erred in finding that Mr. Byrd's service-connected disabilities do not prevent him from engaging in his prior occupation as a truck driver.

The Board's conclusion that Mr. Byrd's service-connected disabilities do not render him unable to obtain and keep substantially gainful employment is not supported by an adequate statement of reasons and bases. The Board's rationale is based on its supposition that while Mr. Byrd's disabilities do not make him suited to a group environment, he can work as a truck driver. After the Board acknowledged that there was medical evidence in the record that admittedly "weighs in favor of finding that the Veteran is unemployable, particularly in a group environment, because of anger, irritability, and a history of outbursts," the Board concluded that Mr. Byrd should nevertheless be able to work as a truck driver because: (1) he worked as a truck driver in the past and truck driving is, in the Board' s estimation, "typically an individual operation"; (2) he left a job driving a truck because of medical conditions unrelated to service-connected disabilities; (3) he has not provided any specific indication of what PTSD or diabetes symptoms render him too disabled to work as a truck driver; and (4) the April 2009 VA examiner opined that Mr. Byrd's PTSD symptoms would make employment—sedentary or active—more difficult, but would not in and of themselves preclude employment. R. at 17–19 (2–21).

All of the reasons the Board proffered for why Mr. Byrd can find work as a truck driver are inadequate to support its finding that he is able to obtain and keep substantially

gainful employment. First, while the Board was correct about Mr. Byrd's history as a truck driver, its conclusion that he could now secure and maintain such employment because it is an "individual operation" rather than a group activity was unsupported by any medical evidence. R. at 18 (2–21). In fact, such a conclusion is directly contradicted by the medical evidence of record that the Board cited in its decision. *Id.* The Board acknowledged the unqualified opinion of a private psychologist, W.A., that Mr. Byrd is "likely to be a danger to ***any*** work environment." *Id.* (emphasis added). The Board also cited W.A.'s assignment of a 39 on the GAF scale,[5] a score which "may suggest major impairment in several areas, such as work, judgment, thinking and mood." *Id.* Importantly, the Board did not discount the competency, credibility, or probative value of W.A.'s opinion. Instead, the Board translated W.A.'s opinion that Mr. Byrd would be a danger in ***any*** work environment into a conclusion that he could work as a truck driver because that environment is an individual operation rather than a group environment. *Id.* However, no such qualification appears in W.A.'s opinion or in any other medical opinion of record. The Board's unsupported translation of W.A.'s opinion amounts to a medical conclusion that Mr. Byrd's psychiatric symptoms do not render him dangerous, a conclusion the Board cannot reach without adequate and independent medical evidence, which is wholly lacking here. *See Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011) (holding that when a Board inference "results in a medical determination, the basis for that inference must be independent and it must be cited"); *Colvin v. Derwinski*, 1 Vet.

[5] The DSM-IV notes that a score of between 31 and 49 is appropriate to assign where there is major impairment in several areas, such as work and school (*e.g.*, depressed man unable to work). DSM-IV at 32.

App. 171, 172 (1991) (holding that when the Board reaches a medical conclusion, it must support its findings with "independent medical evidence").

Not only did the Board pull this conclusion out of thin air, it also failed to address how driving a commercial truck would be any less dangerous to Mr. Byrd or others that might share the road with him than placing him in a work environment that involved more face-to-face interactions with coworkers. While driving a truck for a living might be a more isolating work environment than, say, working in customer service where more interactions with groups of customers and coworkers would likely occur, this is irrelevant. The PTSD symptoms that led W.A. to her conclusion included Mr. Byrd's homicidal tendencies, his problems with emotional and behavioral controls, his angry outbursts, and his suicidality. R. at 133 (130–34). Additionally, the Board's conclusion that Mr. Byrd could obtain and maintain employment as a truck driver because it was a more individual operation, ignored other evidence in the record, including his "homicidal tendencies," his history of having an "urge to kill," and "severe road rage" as evidenced by an incident where Mr. Byrd threatened to assault another driver with a baton. R. at 132–33 (130–34); R. at 269 (265–72).

Even putting aside for the moment Mr. Byrd's homicidal tendencies and suicidal ideation, the Board's decision also failed to explain how Mr. Byrd's other symptoms associated with his service-connected disabilities factored into its conclusion that he can secure and maintain employment as a truck driver. For example, there is medical evidence in the record that Mr. Byrd's PTSD results in impaired judgment, impaired insight, cognitive difficulties in the form of problems with attention, concentration, and

immediate memory, as well as psychomotor agitation, psychomotor retardation, perceptual abnormalities in the form of seeing images out of the corners of his eyes, chronic fatigue, and sleep deprivation due to insomnia. R. at 131–32 (130–34); R. at 109 (109–112); R. at 269–71 (265–72). All of these symptoms are relevant to Mr. Byrd's ability to obtain and maintain employment as a truck driver and the Board's failure to discuss them is error.

Second, while the Board is correct that there is some evidence in the record that Mr. Byrd left his truck driving position due, at least in part, to problems with his arms, there is also lay evidence of record that these problems may be due to diabetic neuropathy. R. at 132 (130–34). Moreover, even if the Board correctly concluded that Mr. Byrd's retirement from truck driving was the result of non-service connected disabilities, its inquiry cannot stop there. The Board must determine whether Mr. Byrd's service connected disabilities alone render him unemployable. 38 C.F.R. §4.16(a) (noting that the "existence or degree of nonservice-connected disabilities or previous unemployability status will be disregarded"); *see also Pratt v. Derwinski*, 3 Vet. App. 269, 272 (1992) (holding that "a determination concerning unemployability indeed must be made on the basis of service-connected disabilities alone").

Third, the Board's statement that Mr. Byrd has not provided any indication of what PTSD or diabetes symptoms render him too disabled to work is not accurate. First, as discussed above, Mr. Byrd has submitted two examination reports by private psychologist, W.A., and these opinions are full of details regarding his PTSD symptoms and their impact on his functioning that shed light on why he could not work as a truck

driver. *See* R. at 130–34; R. at 265–72. Additionally, there is evidence in the record that goes to Mr. Byrd's diabetic lower extremity complications— including numbness, burning, lack of reflexes in his ankles and loss of vibratory sense of the distal lower extremities—evidence relevant to whether Mr. Byrd is capable of operating a truck, including operating critical foot-controlled mechanicals such as gas and brake pedals. R. at 233 (232–36); R. at 104–05 (102–08). At the very least, this evidence reasonably raises the theory that his homicidal ideation, road rage, and neuropathy symptoms render him unable to secure and maintain substantially gainful employment. *See Robinson v. Mansfield*, 21 Vet. App. 545, 552 (2008) (the Board is required to address all issues and theories that are reasonably raised by the claimant or the evidence of record), *aff'd sub. nom*, *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

Fourth, the April 2009 medical opinion upon which the Board relied is inadequate because it was incomplete, lacked a rationale, and failed to take account of significant medical evidence in the record. The Board specifically relied on the examiner's opinion that Mr. Byrd's "psychiatric symptoms would indeed make employment, sedentary or active, more difficult, but would not in and of themselves preclude employment." R. at 111 (109–12). While the Board characterized this examination as "complete," it is anything but. R. at 19 (2–21). First, the examiner's opinion is conclusory and does not explain why Mr. Byrd's PTSD symptoms would not preclude substantially gainful employment. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008) (noting that a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two).

Second, it is clear that the examiner's April 2009 opinion was not based on Mr. Byrd's full mental health history, including a January 2009 opinion by W.A. that explained why Mr. Byrd's PTSD symptoms render him likely to be a danger to any work environment. R. at 111 (109–12). Specifically, under the section of the examination report titled "REVIEW OF THE VETERAN'S MEDICAL RECORDS" the examiner cited W.A.'s June 2008 report and the VA examiner's September 2008 report, but did not address or even mention W.A.'s January 2009 report. The examiner's lack of familiarity with the January 2009 opinion is significant because in that opinion, W.A. discussed at length Mr. Byrd's PTSD symptoms. R. at 132–33 (130–34). These symptoms supported both her assignment of a GAF score of 39—a score representing major functional impairment in areas such as work[6]—and her opinion that Mr. Byrd would be a danger in any work environment. *Id.* These issues clearly go to the opinion on functional abilities that the VA examiner was asked to render.

Accordingly, because the April 2009 examiner was not in possession of the full and accurate history of Mr. Byrd's psychiatric symptoms and failed to provide a rationale for his opinion on the functional impact of Mr. Byrd's psychiatric symptoms, the examination is inadequate. *See Nieves-Rodriguez*, 22 Vet. App. at 302–04, 305 (stating that a central question in determining probative value of an examination is whether the examiner was informed of the relevant facts in rendering a medical opinion and that

[6] DSM-IV at 32.

"most of the probative value of a medical opinion comes from its reasoning"). Thus the Board's heavy reliance on this opinion was error.[7]

B. The Board erroneously construed the time period on appeal and excluded relevant evidence.

The Board erroneously construed Mr. Byrd's VA Form 21-8940, filed days after the RO decision awarding less than the total schedular rating available for his service-connected PTSD and diabetes with neurological manifestations, as a separate claim. This error infected the decision here on appeal. Specifically, under 38 C.F.R. §3.156(b), the VA Form 21-8940 was actually new and material evidence to the original claim for the increase filed in July 2008, not a separate claim. As such, the pertinent appeal period here begins as much as a year prior to the date Mr. Byrd filed his claim for an increased rating on July 8, 2008.[8] Thus, the Board's failure to consider evidence dated prior to December 29, 2008 constitutes prejudicial error.

To explain, Mr. Byrd filed for an increase in his PTSD and diabetes in July 2008. R. at 264. In a rating decision dated December 15, 2008 and mailed on December 19, 2008, the RO increased Mr. Byrd's PTSD rating from 10 percent disabling to 70 percent

[7] While the ultimate responsibility for determining entitlement to TDIU is adjudicatory, *see Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013), when the VA undertakes the effort to provide a medical examination, the Secretary must ensure that it is an adequate one, *see Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007).

[8] As this is an increased rating claim, the effective date may be up to one year before the July 2008 date of claim, if it is factually ascertainable that an increase in disability has occurred within that timeframe. 38 U.S.C. § 5110(b)(2); 38 C.F.R. § 3.400(o). As the Board specifically noted, the "relevant temporal focus for adjudicating an increased rating claim is on the evidence concerning the state of the disability from the time period one year before the claim was filed until VA makes a final decision on the claim." R. at 7 (2–21).

disabling and continued his 20 percent rating for diabetes with neurological manifestations (the "December 2008 Rating Decision"). R. at 170–80. The RO received Mr. Byrd's VA Form 21-8940 on December 29, 2008. R. at 149–51. VA Form 21-8940 identified PTSD, diabetes, and neuropathy—all subjects of the RO's December 15, 2008 rating decision—as the service-connected disabilities that prevented him from securing and following substantially gainful employment. R. at 150 (149–51). In its April 2015 decision denying entitlement to an increased rating for PTSD and TDIU, the Board specifically defined the period on appeal from December 29, 2008, the date the RO received Mr. Byrd's VA Form 21-8940, rather than up to a year prior to July 8, 2008, the date the RO received the original request for increase.[9] R. at 149–51; R. at 4, 11–12 (2–21). In so limiting the appeal period, the Board failed to appreciate that Mr. Byrd's filing of a VA Form 21-8940 was not a separate claim for an increased rating, but instead additional evidence that must be considered in the adjudication of the original claim when determining the proper rate of disability compensation. *Rice*, 22 Vet. App. at 453–54; *see also* 38 C.F.R. § 3.156(b).

The Board's error is not harmless because in narrowing the appeal period to on or after December 29, 2008, the Board failed to consider relevant and favorable medical evidence, including a June 2008 report from W.A. related to Mr. Byrd's PTSD and employability, as well as a September 2008 VA medical examination report related to the severity of his diabetic symptoms. R. at 265–72; R. at 232–36, respectively. Instead the Board considered only the most recent reports from W.A and the VA dated January 2009

[9] *Id.*

and April 2009, respectively, which did not provide the Board with Mr. Byrd's full disability picture. *See, e.g.*, R. at 11–12, 16 (2–21). Similarly, while the Board cited the April 2009 VA examination report to conclude that Mr. Byrd's diabetes is "well controlled," *see* R. at 18 (2–21), this examination failed to discuss, or even mention, the 2008 VA neurological examination finding that Mr. Byrd's "[v]ibratory sense was absent in the toes," that there were decreased reflexes in the ankle," and that there "appears to be a diminished vibratory sense of the distal extremities." R. at 233 (232–36). The VA examiner's 2008 discussion is important because Mr. Byrd's increased rating claim for his diabetes was based, in part, on the development of numbness and burning pain in his lower extremities. R. at 264; R. at 150 (149–51).

Moreover, even if the Board had been correct in limiting the appeal period to on or after December 29, 2008, that would not have excused its failure to discuss relevant favorable evidence related Mr. Byrd's claims for at least two reasons. First, as the Board correctly noted in its decision "the relevant temporal focus for adjudicating an increased rating claim is on the evidence concerning the state of the disability from the time period one year before the claim was filed until VA makes a final decision on the claim." R. at 7 (2–21). Here, both the June 2008 medical opinion by W.A. and the VA examination dated September 2008 are within a year from December 29, 2008, so the evidence should have been discussed. Second, favorable evidence predating a rating period is not per se irrelevant. While the present level of disability is of primary concern in rating a service-connected disability, documents predating the effective date for benefits may not be ignored. See *Francisco v. Brown*, 7 Vet. App. 55, 28 (1994). By regulation, when VA

assigns a disability rating to a veteran's disorder, it is specifically required to assess the veteran's disorder "in relation to its history." 38 C.F.R. § 4.2.

For all the foregoing reasons, remand is appropriate so that the Board can review and consider all evidence of record and all potentially applicable provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991); *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996)(table).

CONCLUSION

For the foregoing reasons, Mr. Byrd respectfully requests the Court issue an Order reversing the Board's April 27, 2015 decision that his denied entitlement to a rating in excess of 70 percent for PTSD. He also respectfully requests that the Court vacate and remand the portion of the Board's decision addressing entitlement to TDIU, so that the Board can provide an adequate statement of reasons or bases for its findings.

Respectfully submitted,

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